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MMC OIL & GAS ENGINEERING SDN BHD v. TAN BOCK KWEE & SONS SDN BHD

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
ABANG ISKANDAR JCA
B NALLINI PATHMANATHAN JCA
[CIVIL APPEAL NO: W-02(NCVC)-1735-10-2014]
18 NOVEMBER 2015

C ***CIVIL PROCEDURE:*** *Trial – Finding of fact – Main contractor entered into consortium agreement for project involving crude storage tanks – Consortium agreement expressly provided for appointment of subcontractor by main contractor – Subcontractor undertook works under project – Main contractor faced financial difficulties and encountered problems in paying subcontractor's claims for works done – Subcontractor carried out and completed works based on assurance that monies* D *would be set aside to pay claims – High Court held that consortium liable to subcontractor for unpaid monies for works done – Whether subcontractor party and privy to consortium agreement – Whether trial judge misread documentary evidence – Whether conclusion erroneous*

E ***CONTRACT:*** *Privity – Subcontract – Consortium agreement – Main contractor entered into consortium agreement for project involving crude storage tanks – Consortium agreement expressly provided for appointment of subcontractor by main contractor – Subcontractor undertook works under project – Main contractor faced financial difficulties and encountered problems in paying subcontractor's claims for works done – Subcontractor carried out and completed works based on assurance that* F *monies would be set aside to pay claims – Whether subcontractor party and privy to consortium agreement – Whether consortium liable to subcontractor for unpaid monies for works done*

The appellant ('MMCOG') had entered into a consortium agreement with Warga Hikmat Kejuruteraan Sdn Bhd ('Warga Hikmat') to carry out a project G involving the engineering, procurement, construction and commision of crude storage tanks ('the project') for Malaysian Refining Company Sdn Bhd ('MRCSB'). The consortium agreement expressly provided for the appointment of subcontractors by each of the parties. The respondent ('the plaintiff') undertook subcontract works under the project and progress H claims payments were made by Warga Hikmat. Warga Hikmat also issued to the plaintiff purchase orders with standard terms and contracts attached to them and the plaintiff agreed to be bound by the same. When Warga Hikmat suffered financial difficulties and encountered problems in meeting the plaintiff's claims for works done, the former sought cooperation of the latter I for deferred payments. This was captured in a letter by the project manager ('John Chok') for the consortium dated 21 October 2009. The plaintiff agreed to the letter dated 21 October 2009 subject to conditions set out in a separate

letter dated 24 October 2009. This separate letter was addressed to the consortium and not Warga Hikmat. The plaintiff sought a written commitment that payment would emanate from Warga Hikmat, as well as MMCOG. MRCSB allegedly gave assurance that monies would be set aside to meet outstanding payments due under Warga Hikmat's contract. According to the plaintiff, it continued and completed works based on the assurance by MRCSB. MMCOG was not party to nor privy to these representations allegedly emanating from MRCSB. The plaintiff alleged that MRCSB made 12 direct payments but the plaintiff did not receive the balance payment of RM7,405,345.77 ('the balance sum'). Dispute arose when the plaintiff renewed its appeals to MRCSB for the assurance that monies would be set aside to meet the payments due to Warga Hikmat's subcontractors. MRCSB refuted liability for the undertakings of Warga Hikmat. The plaintiff filed a claim at the High Court for the balance sum against MMCOG, Warga Hikmat, the consortium and MRCSB. The trial judge found effectively that the consortium was liable to the plaintiff for the unpaid monies for works done. As Warga Hikmat had been wound up and the consortium did not subsist as a legal entity, the trial judge concluded that MMCOG was liable to the subcontractor for these unpaid monies for work done. Hence, the present appeal.

Held (allowing appeal)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) The trial judge failed to accord any or adequate consideration to the fundamental terms of the consortium agreement which expressly provided for the appointment of subcontractors by each of the parties. The trial judge also erred in the construction and interpretation of the purchase orders. The terms and conditions of the purchase orders were not given any or adequate consideration despite the fact that they governed the relationship between Warga Hikmat and the plaintiff, particularly in relation to the claims presently made by the plaintiff. In addition to that, the trial judge misread some details, leading to an erroneous conclusion that a contract subsisted between the plaintiff and the consortium or MMCOG, when in point of fact, the evidence disclosed that a contract existed only between Warga Hikmat and the plaintiff. (paras 59, 60, 63 & 64)

(2) A perusal of the statement of final account issued for works done by the plaintiff was stated to be between Warga Hikmat and the plaintiff. The fact that John Chok had verified the works done in relation to the scope of works undertaken by Warga Hikmat could not create a liability *vis-a-vis* MMCOG and the plaintiff. Even though the terms of the consortium agreement expressly allowed for Warga Hikmat to appoint a subcontractor to carry out its works, the liability for such a subcontract could not become the liability of MMCOG simply because the quality

of the work was verified by the consortium or its project manager. In order to create a liability *vis-a-vis* the consortium or MMCOG specifically, there would be an express undertaking of such a liability either by agreement or by novation. There was nothing on the record of the evidence to justify any such finding. (paras 65-69)

(3) The subcontractor payment certificates, payment advice and cheques for payments were all between the plaintiff and Warga Hikmat, not the plaintiff and the consortium. The fact of payment was of particular importance as it amounted to evidence of the contracting parties in respect of works done by the plaintiff. If indeed it was the consortium or MMCOG that was liable or equally liable for such payments, then it would be expected that payment advice and receipts would be issued and received from them. However, the documentary evidence clearly showed otherwise. It was clear from the bulk of the contemporaneous documentary evidence that the primary parties to the contract for works performed by the plaintiff were Warga Hikmat and the plaintiff. (paras 70 & 71)

(4) The documentary evidence did not disclose the subsistence of any joint or several liability on the part of MMCOG. Neither did the contractual documentation bear out the construction that Warga Hikmat was acting for or on behalf of MMCOG. The documentary evidence instead disclosed that MMCOG had no nexus whatsoever with the works undertaken and performed by the plaintiff at the behest of Warga Hikmat. There was no privity of contract between the plaintiff and the consortium. As such, neither the consortium nor MMCOG could be liable for works done under a contract between Warga Hikmat and the plaintiff. Furthermore, MMCOG had no part to play in the assurance given by MRCSB to the plaintiff in order to complete the works. (paras 71 & 78)

Bahasa Malaysia *Headnotes*

Perayu ('MMCOG') telah memeterai satu perjanjian konsortium dengan Warga Hikmat Kejuruteraan Sdn Bhd ('Warga Hikmat') untuk menjalankan projek melibatkan kejuruteraan, pemerolehan, pembinaan dan komisen tangki pengisian minyak mentah ('projek tersebut') bagi Malaysian Refining Company Sdn Bhd ('MRCSB'). Perjanjian konsortium jelas memperuntukkan pelantikan subkontraktor oleh pihak-pihak. Responden ('plaintif') menjalankan kerja-kerja subkontrak di bawah projek dan bayaran tuntutan berperingkat dibuat oleh Warga Hikmat. Warga Hikmat juga mengeluarkan pesanan belian buat plaintif dengan terma-terma dan kontrak-kontrak standard dilampirkan padanya dan plaintif bersetuju untuk terikat dengan kesemuanya. Apabila Warga Hikmat menghadapi masalah kewangan dan berdepan dengan masalah dalam memenuhi tuntutan-tuntutan plaintif bagi kerja-kerja yang disiapkan, Warga Hikmat meminta kerjasama plaintif bagi

tangguhan bayaran. Ini dicerminkan dalam surat pengurus projek ('John Chok') konsortium bertarikh 21 Oktober 2009. Plaintif bersetuju dengan surat bertarikh 21 Oktober 2009 tersebut tertakluk pada syarat-syarat yang terkandung dalam surat berasingan bertarikh 24 Oktober 2009. Surat berasingan ini dialamatkan kepada konsortium dan bukan Warga Hikmat. Plaintif meminta komitmen bertulis bahawa bayaran akan dibuat oleh Warga Hikmat dan juga MMCOG. MRCSB dikatakan memberi jaminan bahawa wang akan diketepikan untuk melunaskan bayaran tunggakan yang terhutang di bawah kontrak Warga Hikmat. Menurut plaintif, ia meneruskan dan menyempurnakan kerja-kerja berdasarkan jaminan MRCSB. MMCOH bukan pihak dan tidak privi pada representasi-representasi yang dikatakan dibuat oleh MRCSB. Plaintif mendakwa bahawa MRCSB membuat 12 bayaran langsung tetapi plaintif tidak menerima baki bayaran sebanyak RM7,405,345.77 ('jumlah baki'). Pertikaian timbul apabila plaintif memperbaharui rayuannya kepada MRCSB bagi jaminan bahawa wang akan diketepikan untuk melunaskan bayaran terhutang kepada subkontraktor Warga Hikmat. MRCSB menafikan liabiliti bagi perjanjian oleh Warga Hikmat. Plaintif memfailkan tuntutan di Mahkamah Tinggi bagi jumlah baki terhadap MMCOG, Warga Hikmat, konsortium dan MRCSB. Hakim bicara memutuskan bahawa konsortium bertanggungan kepada plaintif terhadap wang yang tidak berbayar bagi kerja yang telah disempurnakan. Oleh sebab Warga Hikmat telah digulung dan konsortium tidak wujud sebagai satu entiti perundangan, hakim bicara memutuskan bahawa MMCOG bertanggungan terhadap subkontraktor bagi wang yang tidak dibayar untuk kerja yang dijalankan. Oleh itu, timbul rayuan ini.

Diputuskan (membenarkan rayuan)

Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara gagal memberi apa-apa atau pertimbangan yang secukupnya kepada terma perjanjian konsortium yang jelas memperuntukkan pelantikan subkontraktor oleh pihak-pihak. Hakim bicara juga terkhilaf dalam pembentukan dan tafsiran pesanan belian. Terma dan syarat pesanan belian tidak diberi apa-apa atau cukup pertimbangan meskipun kesemuanya mengawal hubungan antara Warga Hikmat dan plaintif, khususnya berkenaan tuntutan-tuntutan yang kini dibuat oleh plaintif. Tambahan lagi, hakim bicara terkhilaf dalam membaca beberapa butiran, yang membawa kepada kesimpulan yang khilaf bahawa wujud kontrak antara plaintif dan konsortium atau MMCOG, sedangkan mengikut fakta, keterangan mendedahkan bahawa satu kontrak hanya wujud antara Warga Hikmat dan plaintif.

(2) Penelitian penyata akaun akhir yang dikeluarkan bagi kerja-kerja yang dijalankan oleh plaintif dikatakan antara Warga Hikmat dan plaintif. Fakta bahawa John Chok telah mengesahkan kerja yang disempurnakan bagi ruang lingkup kerja-kerja yang dijanjikan oleh Warga Hikmat tidak

A boleh membentuk liabiliti dalam hubungannya dengan MMCOG dan plaintif. Walaupun terma perjanjian konsortium jelas membenarkan Warga Hikmat melantik subkontraktor untuk menjalankan kerja-kerja, liabiliti bagi subkontrak sedemikian tidak boleh menjadi liabiliti MMCOG hanya kerana kualiti kerja telah disahkan oleh konsortium B atau pengurus projeknya. Untuk membentuk liabiliti berhubungan konsortium atau MMCOG khususnya, terdapat perjanjian nyata liabiliti sedemikian sama ada melalui perjanjian atau novasi. Tiada apa-apa dalam rekod keterangan yang memberi justifikasi bagi dapatan sedemikian.

C **(3)** Sijil bayaran subkontraktor, pemberitahuan pembayaran dan cek-cek bayaran kesemuanya antara plaintif dan Warga Hikmat, bukan plaintif dan konsortium. Fakta bayaran adalah penting kerana ia terjumlah kepada keterangan pihak-pihak berkontrak bagi kerja-kerja yang disempurnakan oleh plaintif. Sekiranya konsortium atau MMCOG yang D bertanggungan atau sama-sama bertanggungan bagi bayaran demikian, maka pemberitahuan bayaran dan resit dijangka akan dikeluarkan dan diterima oleh mereka. Walau bagaimanapun, keterangan dokumentar jelas menunjukkan sebaliknya. Jelas daripada ikatan keterangan dokumen semasa bahawa pihak-pihak utama dalam kontrak bagi kerja-E kerja yang dijalankan oleh plaintif adalah Warga Hikmat dan plaintif.

(4) Keterangan dokumentar tidak mendedahkan kewujudan apa-apa liabiliti bersama atau beberapa di pihak MMCOG. Dokumentasi kontraktual juga tidak menyatakan pembentukan bahawa Warga Hikmat bertindak untuk atau bagi pihak MMCOG. Sebaliknya, keterangan dokumentar F mendedahkan bahawa MMCOG mempunyai apa-apa perhubungan dengan kerja-kerja yang dijanjikan dan dilaksanakan oleh plaintif atas perintah Warga Hikmat. Tiada priviti kontrak antara plaintif dan konsortium. Dengan itu, konsortium mahupun MMCOG tidak bertanggungan bagi kerja-kerja yang dilaksanakan di bawah kontrak G antara Warga Hikmat dan plaintif. Tambahan lagi, MMCOG tidak memainkan apa-apa peranan dalam jaminan yang diberi oleh MRCSB kepada plaintif untuk menyempurnakan kerja-kerja.

Case(s) referred to:

Anderson v. City of Bessemer (1985) 470 US 564 ***(refd)***

H *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC* ***(refd)***

Carlyle v. Royal Bank of Scotland Plc [2015] UKSC 13 ***(refd)***

Clarke v. Edinburgh and District Tramways Co Ltd [1919] SC (HL) 35 ***(refd)***

Dato' Shazryl Eskay Abdullah v. Merong Mahawangsa Sdn Bhd & Anor [2014] 5 CLJ 265 CA ***(refd)***

I *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC* ***(refd)***

Faber Merlin (M) Sdn Bhd & Ors v. Lye Thai Sang & Anor; Tan Kim Chua Realty (M) Sdn Bhd v. Lye Thai Sang & Anor [1985] 1 LNS 44 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Henderson v. Foxworth Investments Limited And Another [2014] UKSC 41 ***(refd)***
Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(refd)***
McGraddie v. McGraddie and Another [2013] UKSC 58 ***(refd)***
Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka [2014] 9 CLJ 1064 FC ***(refd)***
Thomas v. Thomas [1947] AC 484 ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
Yuill v. Yuill [1945] P 15 ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 18

For the appellant - Mohd Arief Emran; M/s Wong & Partners
For the respondent - Kavi Mani Muthayam; M/s Megat Najmuddin Leong & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-1259-10-2012 (overruled).]

Reported by Najib Tamby

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

[1] This appeal is concerned with a claim by a subcontractor, namely the respondent, who was the plaintiff in the court below ('plaintiff'), against the appellant who was the first defendant in the court below ('MMCOG'). There is no direct relationship between the plaintiff and MMCOG in the form of a contract or otherwise. Their nexus, as it were, arises from MMCOG having entered into a consortium agreement with the second defendant, a company known as Warga Hikmat Kejuruteraan Sdn Bhd ('Warga Hikmat') on 7 February 2007. The first and second defendants had entered into this consortium agreement in order to carry out a project involving the engineering, procurement, construction and commissioning of crude storage tanks for Malaysian Refining Company Sdn Bhd (who was the fourth defendant in the court below[1]). Although they entered into this consortium agreement, no entity in law subsisted between MMCOG and the second defendant. To that extent, the plaintiff's pleadings against the named third defendant in the court below are misconceived, as 'Consortium of Warga Hikmat and MMCOG' does not subsist in law.

[2] In any event, the plaintiff undertook sub-contract works in relation to a part of the aforesaid project work and seeks to be paid for such works. It is the plaintiff's pleaded case that it carried out the sub-contract works for and on behalf of the consortium. On the contrary, it is MMCOG (appellant's) case that the plaintiff entered into a sub-contract to carry out works solely with the second defendant, Warga Hikmat and not the consortium.

[3] The learned judge in the court below found effectively that the consortium was liable to the plaintiff for these unpaid monies for work done. As Warga Hikmat had been wound up, and as the consortium does not subsist as a legal entity, the learned judge concluded that MMCOG was liable to the sub-contractor for these unpaid monies for work done. Accordingly, judgment was entered against MMCOG in the sum of RM7,405,345.77.

[4] On appeal, this court reversed the decision of the learned trial judge. The main ground for this reversal was that we took a different view from that of the trial judge of the facts as disclosed by the evidence (particularly the documentary evidence) given at the original hearing, and of the inferences to be properly drawn from such evidence. Ultimately therefore, the question is whether there was sufficient justification for reversing the conclusion reached by the learned trial judge.

Intervention By The Court Of Appeal

[5] As this matter comes before this court on appeal after a full trial, this court is bound to have regard to the limited power of an appellate court to reverse findings of fact of the judge who has heard the evidence. It is a long settled principle, stated and restated both domestically and in wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong. The famous speech of Lord Thankerton in *Thomas v. Thomas* [1947] AC 484 is arguably the most frequently cited judicial *dicta* on this point:

> (1) Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion. (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses and the matter will then become at large for the appellate court.

[6] Similarly, the speeches of Lord Shaw of Dunfermline in *Clarke v. Edinburgh and District Tramways Co Ltd* [1919] SC (HL) 35, 36-37 where he said that an appellate court should only intervene where it is satisfied that the trial judge was "plainly wrong", and the dictum of Lord Greene MR in *Yuill v. Yuill* [1945] P 15 (at p. 19) are equally familiar. These *dicta* all point to the fact that it should only be on the rarest of occasions and where the appellate court is convinced by the plainest of considerations that it would be justified in finding that the trial judge had come to an erroneous conclusion on the evidence before him.

[7] It is not only the audio-visual advantage that forms the primary basis for this rule. In *McGraddie v. McGraddie and Another* [2013] UKSC 58 or [2013] 1 WLR 2477, the English Supreme Court in addressing this issue made reference to the United States Supreme Court case of *Anderson v. City of Bessemer* (1985) 470 US 564, 574-575:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be the 'main event' rather than a 'tryout on the road' ... For these reasons review of factual findings under the clearly erroneous standard - with its deference to the trier of fact - is the rule, not the exception.

[8] The instances where an appellate court will intervene are succinctly set out in the recent English Supreme Court case of *Henderson v. Foxworth Investments Limited and Another* [2014] UKSC 41 where Lord Reid summarised the position thus at para. 67 of his judgment:

> It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.

[9] In *Carlyle v. Royal Bank of Scotland Plc* [2015] UKSC 13 the UK Supreme Court explained the rationale underlying appellate intervention thus:

> The rationale of the legal requirement of appellate restraint on issues of fact is not just the advantage which the first instance judge has in assessing the credibility of witnesses. It is the first instance judge who is assigned the task of determining the facts, not the appeal court. The re-opening of all questions of fact for redetermination on appeal would expose parties to great cost and divert judicial resources for what would often be negligible benefit in terms of factual accuracy. It is likely that the judge who has heard the evidence over an extended period will have a great familiarity with the evidence and a deeper insight in reaching conclusions of fact than an appeal court whose perception may be narrowed or even distorted by the focused challenge to particular parts of the evidence ...

[10] The case-law on this issue domestically has long incorporated the foregoing principles. Appellate courts will not generally intervene save in the face of clear errors of law. Such errors can arise even in relation to findings on credibility and demeanour when the findings are inconsistent with the evidence on record before the court. In *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229 Lee Hun Hoe (CJ Borneo) relied on *Yuill v. Yuill* (above) when reversing the trial judge in relation to his findings on the credibility of witnesses and their evidence. He explained his reasons for doing so as follows:

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity ...

[11] More recently in *Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka* [2014] 9 CLJ 1064, Raus Sharif (President of the Court of Appeal) opined as follows in relation to the powers of the appellate court:

> [45] It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary duty of evaluation of the evidence. However, the appellate court is under a duty to intervene in a case where the trial court has so fundamentally misdirected itself. In our judgment we find that there was insufficient judicial appreciation by the learned trial judge of the pleadings and contemporaneous evidence in the instant case when she allowed Merita's claim. Such erroneous finding warranted appellate interference which the Court of Appeal rightfully done so, and we have no reason to disagree. We agree with the Court of Appeal in finding that the learned trial judge erred in finding ...

[12] The frequently cited *dicta* of Steve Shim CJ (Sabah Sarawak) in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 similarly sets out the criteria when an appellate court is bound to intervene in findings made by a trial court:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think, appropriate that we say what judicial appreciation of evidence involves.

> ... A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. He must also test the evidence of a particular witness against the probabilities of the case.

[13] Most recently, the Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 reiterated the principle to be adopted by an appellate court when reversing findings of fact by a trial court:

> ... It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is "the plainly wrong test" principle; see the Federal Court in *Gan Yook Chin & Anor (P) v. Lee Ing Chin @ Lee Teck Seng & Anor* [2004] 4 CLJ 309; [2005] 2 MLJ 1 (at p. 10) per Steve Shim CJ SS. More recently this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Berhad v. Genisys Integrated Pte ltd* [2010] 9 CLJ 785 where it was held at p. 800:
>
> > It is well-settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence. (see *Chow Yee Way & Anor v Choo Ah Pat* [1978] 1 LNS 32; *Watt v Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2004] 4 CLJ 309.

[14] The requirement for the trial judge to have come to a finding which was "plainly wrong" before an appellate court may intervene is therefore well entrenched in our appellate philosophy and practice. In *Henderson v. Foxworth Investments Ltd and another* (above) Lord Reed considered the meaning to be accorded to the phrase "plainly wrong":

> ... there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb "plainly" does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

[15] This is a point of some importance because it underscores the rationale that the appellate court is not at liberty to reverse or interfere in the finding of a trial judge even if the appellate court is clearly of the view that it would not have reached the conclusion the trial judge did on the evidence on record before it. It requires something more. The requisite or correct standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. In other words, so long as the

findings of the trial judge are plausible on the evidence on record, there is no room for interference merely on the grounds that the appellate court forms a different opinion on the same evidence.

[16] There is, however, little room for variation in the application of the principle of intervention when the trial judge is "plainly wrong". Appellate courts ought to be consistent in ensuring that appellate intervention only comes about when a trial judge reaches a conclusion which no reasonable judge could have reached. A lack of such consistency in approach would give rise to considerable uncertainty in the practice and progress of litigation. Litigants through their counsel should be able to assess with some degree of certainty, on clear and distinctly applied principles of law, whether a judgment obtained at first instance is likely to be overturned or not. This is only possible if there is a consistent application of the "plainly wrong" principle underlying appellate intervention.

[17] The obverse or counterpart to the requirement for appellate restraint in dealing with findings of fact by the trial judge is the fundamental requirement that the judgment of first instance does in fact amount to a comprehensive and cohesive determination of the material matters comprising the subject matter of dispute before the trial judge. This requires the trial judge to undertake a full evaluation of the evidence and issues placed before the court. A first instance judgment is open to challenge when it fails to address or wholly ignores material evidence or issues placed before it, or when bald findings of fact are made with no reasoning or evidence to substantiate such findings. Equally errors of law, a clear misunderstanding of relevant evidence and such clearly identifiable errors will all contribute towards a decision that would be considered to be "plainly wrong".

[18] Judicial decisions are required to be handed down expeditiously and with minimum delay. However this ought not to compromise the fundamental requirement that trial judges undertake a comprehensive and holistic approach to the evaluation of evidence in reaching their findings at first instance. A failure to consider the entirety of the evidence and material issues, a failure to make findings of fact or the making of bare findings of fact, all allow for appellate intervention. Apart from the real possibility of a miscarriage of justice, such omissions by a trial judge require the appellate courts to take on the role of first instance judges and review the evidence in its entirety afresh. This in turn amounts to a strain on judicial resources. The importance of a comprehensive consideration of the matter at first instance cannot be sufficiently emphasised. Equally when there has been just such a holistic approach adopted, there should be considerable appellate restraint exercised when reviewing a first instance judgment on appeal.

[19] Having set out the legal principles underlying appellate intervention, we turn to the facts of the present case.

The Parties And The Claim

[20] As stated at the outset, this appeal is brought by MMCOG (the appellant) against the High Court's decision allowing the claim by the plaintiff against it, in respect of outstanding payments for work done.

[21] The second defendant, Warga Hikmat Kejuruteraan Sdn Bhd ('Warga Hikmat'), the third defendant, Consortium of Warga Hikmat And MMCOG and the fourth defendant, Malaysian Refining Company Sdn Bhd ('MRCSB') are not parties to this appeal.

[22] The plaintiff's claim against the fourth defendant was struck out on 18 September 2013 by way of an O. 18 of the Rules of Court (RC) 2012 application in the High Court on the ground that the plaintiff had no cause of action against the fourth defendant. The plaintiff's appeal against this decision was dismissed by the Court of Appeal on 12 December 2013. The plaintiff's application for leave to appeal to the Federal Court was dismissed by the Federal Court on 28 April 2014.

[23] The second defendant, Warga Hikmat, was wound up in the Johor Bahru High Court on 15 November 2010. The second defendant, through its liquidator, filed its defence. However before the trial began, Warga Hikmat's solicitors advised that it would not adduce evidence at the trial and would abide by the High Court's decision. On 6 May 2014, Warga Hikmat recorded a consent judgment with the plaintiff. However the plaintiff maintains that it has not realised any monies from this judgment as Warga Hikmat is insolvent.

[24] The third defendant is not an entity known in law in that it is not capable of suing or being sued. It cannot therefore comprise a party to the action. As matters stand therefore, the trial proceeded against MMCOG only.

Brief Background Facts

[25] The undisputed factual background is set out comprehensively in the parties' written submissions, which we adopt.

[26] On 8 December 2006, MMCOG and Warga Hikmat entered into an agreement with MRCSB, the fourth defendant, known as the "Engineering, Procurement, Construction and Commissioning of Additional PSR-2 Crude Storage Tanks Project" ('the EPC project agreement').

[27] Subsequently on 7 February 2007, MMCOG and Warga Hikmat entered into a consortium agreement in order to fulfil their respective obligations under the terms of the EPC project ('the consortium agreement'). This meant that at the date of executing the EPC project agreement on 8 December 2006, the consortium agreement between MMCOG and Warga Hikmat had not been formalised.

[28] The terms of the consortium agreement between MMCOG and Warga Hikmat are of importance because they delineate the work to be undertaken by each party under the EPC project agreement. This in turn has a direct bearing on the sub-contracting of works to the plaintiff. The material terms include the following:

> 2.1 The Parties, desirous in forming a Consortium are now entering into this Agreement to regulate their relationship in the Consortium and to set out the terms and conditions of undertaking the Works.
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> 2.2 The Parties shall undertake and complete the works in accordance with the terms and conditions of this Agreement and the terms and conditions of the Contract as accepted by the Consortium.
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> ...
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> ...
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> 3.1 The Parties agree that the allocation of work of which is to be carried out under the Contract by each Party shall be in accordance with Appendix I, which shall form a part of this Agreement and the Parties shall be wholly responsible for its respective scope of work as described herein.
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> ...
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> ...
>
> 5.2 Save for the respective scope of work whereby the Parties may consider appointing sub-contractors and/or consultants (if necessary), neither Party shall enter into any agreements, arrangements or negotiations with nor entertain any approach from any other person, company or body corporate or incorporate during the duration of this Agreement.
>
> ...
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> ...
>
> 15.4 Nothing in this Agreement shall be deemed or construed to constitute either party as a partner or representative of the Other Party, or to create any trust, and neither Party shall have the authority to act for or to incur any obligation on behalf of the other Party except as expressly provided in this Agreement. Each Party shall at all times be acting as an independent business entity on the ordinary course of business. Nothing in this Agreement shall authorise either of the Parties to pledge the credit of the other or of the Consortium or to act the other's agent except insofar as this may have been expressly authorised in writing.

[29] Of relevance is cl. 3.1 and Appendix 1 which sets out the scope of work of each of the entities within the consortium. A perusal of Appendix 1 discloses that there is a detailed breakdown of the individual scope of responsibility of MMCOG and Warga Hikmat under the agreement. The responsibilities for various parts of the project work are clearly separate and equally clearly delineated. In short, it is possible to ascertain and identify

from a mere perusal of Appendix 1, those parts of the work to be undertaken by Warga Hikmat and those portions to be undertaken by MMCOG. These jobs or scope of works are different.

[30] The plaintiff was appointed as subcontractor to undertake certain works as of May 2007. The crux of the dispute in the case is whether the plaintiff was appointed by the consortium or by Warga Hikmat. In this context however, it is not in dispute that Warga Hikmat is the entity that issued purchase orders to the plaintiff. These purchase orders bear the numbers WH10705 to WH15359 and were issued between 9 May 2007 and 29 June 2010. Standard terms and contracts of Warga Hikmat were attached to the purchase orders and the plaintiff agreed to be bound by the same.

[31] The plaintiff received payments in respect of progress claims made. These payments were made by Warga Hikmat. Payment certificates and cheques for the said works were issued by Warga Hikmat to the respondent. However Warga Hikmat subsequently suffered financial difficulties and encountered problems in meeting the plaintiff's claims for work done.

[32] On 16 October 2009, a meeting was held between Warga Hikmat and the plaintiff. (The plaintiff maintains, however, that this meeting was between the consortium comprising MMCOG as well as Warga Hikmat and itself). The purpose of the meeting was to discuss an alternative payment scheme and the mode of payment to the plaintiff.

[33] The events of the meeting of 16 October 2009 are captured in a letter issued by one John Chok Liong Juan, the project manager for the consortium. This letter is dated 21 October 2009. The letter clearly makes reference to a meeting between Warga Hikmat as contractor and the plaintiff as subcontractor.

[34] The letter then sets out the agenda that was discussed during the meeting, namely:

(i) Warga Hikmat as contractor, updated and explained the current status of their claims with the owner, MRCSB;

(ii) Warga Hikmat then briefed the plaintiff on proposals for the payment scheme and mode of payment to it;

(iii) Warga Hikmat advised of a proposed plan and assurance of payments to its subcontractor, namely the plaintiff by the owner, MRCSB;

(iv) Warga Hikmat requested the plaintiff to come up with proposals and respond on a proposal in relation to the provision of a performance bond to MRCSB; and

(v) a proposed payment scheme to the plaintiff was annexed to this letter as Appendix 1 and the plaintiff was asked to consider this payment schedule favourably.

[35] In short, Warga Hikmat sought the co-operation of the plaintiff, its sub-contractor for a deferred payment of monies due and owing to it for work done.

[36] The plaintiff's version of events of the meeting of 16 October 2009 (which is not borne out by the letter of 21 October 2009) is as follows:

(a) To agree to part of the payment that was due to the consortium to be held by MRCSB *in lieu* of the performance bond on behalf of the third defendant;

(b) To have the money set aside to be released to the plaintiff and other subcontractors by MRCSB, the owner, in several stages, based on the achievement of "key milestones" of the project;

(c) Upon obtaining the consent of all subcontractors to this proposal, MRCSB would make payments to all the subcontractors directly for the work done, after deducting whatever amount that was agreed to be retained for the performance bond; and

(d) In support of the proposal, all subcontractors were requested to give a letter of commitment to continue with the work and to achieve the "key milestones".

[37] On 24 October 2009, the plaintiff agreed to the proposal set out in the letter of 21 October 2009 issued by John Chok, but subject to conditions set out in a separate letter issued by it and dated 24 October 2009. This separate letter was issued on the plaintiff's letter head and addressed to the consortium as opposed to Warga Hikmat. For the first time, the plaintiff then sought a written commitment that payment would emanate from Warga Hikmat as well as MMCOG. The letter was written on a without prejudice basis.

[38] On 24 November 2009, all Warga Hikmat's subcontractors wrote to MRCSB, asking for a letter of undertaking or assurance from MRCSB that monies would be set aside to meet outstanding payments due under Warga Hikmat's contract. The plaintiff was one of the subcontractors who wrote to MRCSB.

[39] Subsequently on 1 December 2009, John Chok on the letterhead of the consortium, notified the plaintiff to issue a bank guarantee in the sum of 10% of the value of the purchase orders issued and a warranty bond. However, no form of guarantee was issued by the plaintiff to either Warga Hikmat or MRCSB.

[40] On 3 December 2009, another meeting was held between Warga Hikmat and its subcontractors. A handwritten note of the meeting discloses that:

(a) All subcontractors gave their commitment to complete the outstanding works;

(b) 5% of each contract sum will be held by MRCSB as owner *in lieu* of the Warranty Bond throughout the warranty period of the project;

(c) A letter of commitment would be obtained from MRCSB to the effect that it would make payment directly to the subcontractors for amounts owing to them; and

(d) Warga Hikmat is committed to issue all outstanding payments up to the cut-off date of 4 December 2009. There was no mention of MMCOG in relation to such commitment.

[41] It will be noted that MMCOG played no part in this meeting.

[42] On 16 December 2009, MRCSB informed the plaintiff that it was unable to accede to its request for a letter of undertaking. However, according to the plaintiff, MRCSB gave an assurance of assistance in respect of the remittance of payments to the subcontractors, but sought their co-operation as the completion of the project was "now very critical and becoming a very significant milestone". Again it is to be noted that MMCOG was not party to nor privy to these representations allegedly emanating from MRCSB.

[43] The plaintiff maintains that based on the representation by MRCSB in the letter dated 16 December 2009, the plaintiff continued with and completed the works.

[44] According to the plaintiff MRCSB made 12 direct payments to the plaintiff between May 2009 to July 2010. By the beginning of 2011, the plaintiff completed all the works prescribed in all the purchase orders received. However, the plaintiff did not receive the balance payment of RM7,405,345.77.

[45] The plaintiff then renewed its appeals to MRCSB for the assurance that monies would be set aside to meet the payments due to Warga Hikmat's contractors. This is seen in letters dated 9 January 2010, 8 July 2010 and 15 January 2011. In the letter of 8 July 2010 which was issued directly by the plaintiff, it describes itself as the main civil work subcontractor under Warga Hikmat, rather than as a subcontractor of the consortium.

[46] MRCSB however responded to the plaintiff *vide* letter dated 1 February 2011, stating that it was not liable for the undertakings of Warga Hikmat and could not agree to this request. The plaintiff however pressed on with a further appeal as is evident from its letter dated 26 March 2012 to MRCSB.

[47] Then on 27 March 2012, for the first time the plaintiff issued a letter of demand solely to MMCOG demanding payment of the debts of Warga Hikmat. Relying on the letter of 1 December 2009 issued by John Chok as project manager, the plaintiff sought recovery of monies due and owing to it for sub-contract works undertaken for Warga Hikmat, from the

consortium. The plaintiff maintained that it had been the consortium's plan, upon the subcontractor's collective agreement to utilise sums due to them for the purposes of provision of a performance bond and warranty bond by Warga Hikmat, that they would receive the monies due to them belatedly by way of milestones. However for the first time, such liability was sought to be imposed upon the consortium as opposed to Warga Hikmat.

[48] In this context the plaintiff maintained (again for the first time) that it was the consortium that had engaged it. However no invoices or purchase orders or any documentary evidence was annexed to this demand. (The purchase orders and invoices disclose, to the contrary, that they were issued solely by Warga Hikmat.)

[49] MMCOG responded *vide* letter dated 16 April 2012 advising that it had never had any dealings with the plaintiff in respect of the project. MMCOG stated that all negotiations referred to by the plaintiff were handled by Warga Hikmat "in their own stead and capacity with regard to WHK's scope of work under the project." In short, MMCOG denied any contractual relationship with either the plaintiff or any of the other subcontractors. MMCOG then suggested that recourse should be sought directly from the liquidators of Warga Hikmat, which was by then in liquidation.

[50] Consequently on 15 October 2012, the plaintiff filed a claim in the Kuala Lumpur High Court to claim for the sum of RM7,405,435.77 from the defendants. On 25 September 2014, the High Court held in favour of the plaintiff and ordered MMCOG to pay the plaintiff RM7,405,345.77 with interest on that sum at 4% per annum from the date of filing of the writ until the date of full settlement together with costs of RM25,000.

The Findings Of The High Court

[51] In the course of her judgment the learned trial judge made, *inter alia*, the following salient findings on the evidence before her:

(i) the learned judge, with respect, correctly identified the core issue for trial as one of privity, namely whether there was any privity of contract between the plaintiff and MMCOG;

(ii) the learned judge concluded after considering the evidence as a whole that the contracts pursuant to which the plaintiff made its claims were entered into between the consortium (comprising MMCOG and Warga Hikmat) on the one hand and the plaintiff on the other, rather than between Warga Hikmat as contractor and the plaintiff as subcontractor;

(iii) the nett result of such a finding is that MMCOG as one of the legal entities in the consortium becomes liable for the plaintiff's claims, jointly and severally with Warga Hikmat. Warga Hikmat has however been wound up and therefore the plaintiff's claim which is that of an unsecured creditor, is not recoverable from Warga Hikmat;

(iv) the learned judge concluded that MMCOG as a member of the consortium was liable for the plaintiff's claims, primarily on the basis of the oral evidence of the witnesses for the plaintiff, notwithstanding that their testimony contradicted or was in conflict with the documentary evidence;

(v) the learned judge was persuaded by the fact that work in progress was certified by the project consortium's employees and certification of work was issued on letters carrying the consortium's letterhead;

(vi) the learned judge concluded that the consortium had negotiated with the plaintiff and other subcontractors of Warga Hikmat in relation to outstanding payments due for sub-contract work undertaken by the plaintiff, rather than Warga Hikmat;

(vii) the learned judge found MMCOG's witness to be less than credible and faulted her for relying on various clauses in the consortium agreement relating to the respective duties and obligations of Warga Hikmat and MMCOG respectively; and

(viii) the learned judge further concluded that MMCOG had taken hold of and controlled the escrow account of the consortium in place of Warga Hikmat after the latter was wound up. Given MRCSB's testimony that it had paid in full for works done into the escrow account, and the assumption that MMCOG had full control of this escrow account, the learned judge extrapolated and found that MMCOG was liable to the plaintiff for the balance sum due and owing to it. Such a conclusion was reached despite the fact that there was no evidence to suggest that MMCOG had access to or control of the escrow account.

The Appeal

[52] We allowed the appeal after considering the entirety of the documentary and oral evidence on record primarily for the following reasons:

(a) The contracts pursuant to which the plaintiff founded its claims were entered into between the plaintiff and Warga Hikmat, rather than the plaintiff and the consortium partners, namely Warga Hikmat and MMCOG;

(b) There had been no or insufficient consideration accorded to the written terms and conditions governing the relationship between the contracting parties, as borne out by the purchase orders, invoices and statements;

(c) The invoices for work done were issued by the plaintiff to Warga Hikmat and not the consortium. Payments for work done were made by Warga Hikmat and not from the consortium account. In this context the purchase orders, statements of final accounts and payment certificates were issued by Warga Hikmat to the plaintiff and not by the consortium to the plaintiff;

A (d) The consortium agreement regulates the relationship between Warga Hikmat and MMCOG with MRCSB. It specifically precludes the formation or subsistence of any agency relationship or partnership between the parties; and

B (e) The consortium is not a legal entity that could enter into a contract with the plaintiff. Neither is it a partnership.

[53] In summary therefore we found that the learned judge, with respect, had failed to give any or adequate consideration to contemporaneous documentary evidence evidencing the nature of the relationship between the C parties. Instead undue (or erroneous) weight had been accorded to oral evidence which was in conflict with such contemporaneous documentary evidence. Additionally, weight was accorded to portions of documents without a consideration of the evidence as a whole. In short there was judicial misappreciation of the evidence as a whole. These matters will be discussed in further detail below.

D

Issue 1: Were The Contracts On Which The Plaintiff Founded Its Claim Made Between The Plaintiff And Warga Hikmat Or Between The Plaintiff And The Consortium Partners, Namely Warga Hikmat And MMCOG?

[54] As stated at the outset, the consortium agreement was between Warga E Hikmat and MMCOG for works to be carried out for MRCSB. The material terms of the consortium agreement have been set out. It is important to reiterate that Warga Hikmat and MMCOG agreed that work was to be undertaken in accordance with the schedule set out in Appendix 1. This is set out in cl. 3.1 of the consortium agreement.

F **[55]** Again as stated at the outset, Appendix 1 comprises a detailed breakdown of every aspect of the work to be undertaken and commissioned. Columns in Appendix 1 set out the scope of the work to be undertaken by Warga Hikmat and MMCOG respectively. In other words, the scope of work undertaken by the consortium partners was disparate and distinct.

G **[56]** Clause 5.2 expressly provides that each of the partners was at liberty to appoint subcontractors but only for their respective scope of works. Importantly, neither Warga Hikmat nor MMCOG was to enter into any other agreements or negotiations with any parties during the agreement.

H **[57]** Perhaps most importantly, cl. 15.4 expressly precludes the subsistence of any agency or partnership or trust relationship between the parties. Neither party was authorised to act for, or to incur any obligation on behalf of the other, save as expressly provided. Warga Hikmat and MMCOG were at all times to act as independent business entities in the ordinary course of business.

I

[58] It is clear from the foregoing that the nature of the relationship between Warga Hikmat and MMCOG was such that:

(a) The scope of work to be undertaken was clearly delineated. Neither party was responsible for the scope of work of the other;

(b) Each of the consortium partners was allowed to sub-contract its portion of work out to subcontractors if it so chose. However apart from such specific appointments pertaining to their individual scope of work, the consortium partners were not authorised to enter into any agreements or negotiations, effectively on behalf of the consortium; and

(c) The consortium partners were expressly precluded from acting on each other's behalf or pledging the credit of either party or the consortium in the course of the agreement for any purposes otherwise than as expressly authorised.

[59] It is pertinent that the learned judge failed to accord any or adequate consideration to the fundamental terms of the consortium agreement which expressly provided for the appointment of subcontractors by each of the parties. This amounted to a failure to accord any or any adequate consideration to salient, relevant evidence. This in turn resulted, with the greatest of respect, in a judicial misappreciation of the evidence.

Issue 2: The Purchase Orders

[60] The learned judge also erred in the construction and interpretation of the purchase orders. A perusal of the purchase orders, for example WH11612, dated 2 November 2011, which was tendered at trial discloses that:

(a) It was issued by Warga Hikmat to the plaintiff. There is no mention of MMCOG or the consortium in these purchase orders;

(b) The purchase order was subject to standard terms and conditions imposed by Warga Hikmat (and not the consortium MMCOG);

(c) The preamble stipulates expressly that Warga Hikmat, referred to as the main contractor, requires the provision of manpower, materials and other items as specified thereunder, and that the plaintiff, referred to as the subcontractor, is willing and able to execute such works. In short there is a contract between Warga Hikmat and the plaintiff. There is no mention of either MMCOG or the consortium;

(d) Under art. 5 of these terms and conditions, Warga Hikmat (rather than MMCOG or the consortium) undertook to pay the plaintiff the provisional price for the performance of such works;

(e) Under art. 7, invoicing was to be issued by the plaintiff to Warga Hikmat; and

(f) Article 8 provided for Warga Hikmat, rather than the consortium or MMCOG, to certify the work done by the subcontractor.

[61] These terms and conditions were not given any or adequate consideration by the learned trial judge, despite the fact that they governed the relationship between Warga Hikmat and the plaintiff, particularly in relation to the claims presently made by the plaintiff.

[62] Similarly all the other purchase orders were also executed between Warga Hikmat and the plaintiff, rather than the consortium or MMCOG. Neither did these purchase orders provide that Warga Hikmat was contracting on behalf of the consortium. These purchase orders comprise contemporaneous documentary evidence which sets out the basis of the formation and regulation of the relationship between Warga Hikmat and the plaintiff resulting in the performance of the sub-contract works by the plaintiff. This contract therefore underscores the basis of the plaintiff's claim for balance monies due to it for work done.

[63] In this context, it is relevant that the learned judge in evaluating the evidence appears to have inadvertently misread some details. The purchase order that she refers to in her judgment as 'P.O. WHW705' should in fact read 'WH10705'. More importantly the learned trial judge erroneously states that it was issued by PW4, one John Chok, the project manager of the consortium. A perusal of the purchase order however reflects that John Chok's name does not in fact appear on the purchase order.

[64] Instead, the names Mohd Jailani Wagiman and another unclear signature are apparent on the face of the purchase order. They are employees of Warga Hikmat. However, the most salient feature of the purchase order is that it is clearly issued by Warga Hikmat and accepted by the plaintiff, therefore clearly evidencing a contract between these two entities rather than the consortium or MMCOG and the plaintiff. There are therefore factual inaccuracies in the consideration of the documentary evidence, which has repercussions on the conclusions to be drawn in relation to the correct contracting parties. As a consequence of these factual inaccuracies the learned judge erroneously concluded that a contract subsisted between the plaintiff and the consortium or MMCOG, when in point of fact the evidence discloses that a contract existed only between Warga Hikmat and the plaintiff.

Issue 3: Statement Of Final Account

[65] A perusal of the statement of final account issued for work done by the plaintiff is stated to be between Warga Hikmat and the plaintiff. The learned judge placed considerable weight on the fact that the work done had been verified by one of the consortium's witnesses, a project manager and director. However in doing so, there appears to have been no or inadequate consideration accorded to the fact that the primary parties to the final statement remained Warga Hikmat and the plaintiff.

[66] The fact that the project director for the consortium had verified the work done in relation to the scope of works undertaken by Warga Hikmat, cannot create a liability *vis a vis* MMCOG and the plaintiff. Although the learned judge agreed with learned counsel for MMCOG that the verification of work was undertaken on behalf of the consortium, she took the view that the oral evidence of the consortium's project managers, particularly PW3 and PW-4, disclosed that they had certified the work done and signed the final certificates in their positions as employees of the consortium, and not for the second defendant.

[67] In so concluding the learned judge appears, with respect, to have confused the function of the verification of works on behalf of the consortium, with liability under a sub-contract entered into between Warga Hikmat and the plaintiff. The fact that verification was undertaken by the consortium's employees does not mean that MMCOG or the consortium then became liable for the sub-contract works undertaken by the plaintiff at the behest of Warga Hikmat.

[68] It is undeniable that the work performed by the plaintiff in its stated capacity as a subcontractor was entirely at the behest of Warga Hikmat. The terms of the consortium agreement expressly allow for Warga Hikmat to appoint a subcontractor to carry out its works. But having done so, the liability for such a sub-contract cannot become the liability of MMCOG simply because the quality of the work was verified by the consortium or its project directors. In other words, the express terms of the consortium agreement, particularly the clauses highlighted earlier, prevail and govern issues of liability in terms of payment.

[69] In order to create a liability *vis a vis* the consortium or MMCOG specifically, there would need to be an express undertaking of such a liability either by agreement or by novation. There is nothing on the record of the evidence to justify any such finding.

Issue 4: Payment Certificates And Payment Advice

[70] Similarly the subcontractor payment certificates, payment advice and cheques for payments were all between the plaintiff and Warga Hikmat, not the plaintiff and the consortium or MMCOG. This is another salient fact that was not given consideration by the learned judge. The fact of payment is of particular importance as it amounts to evidence of the contracting parties in respect of work done by the plaintiff. If indeed it was the consortium or MMCOG that was liable or equally liable for such payments, then it would be expected that payment advice and receipts would be issued and received from them. However the documentary evidence clearly shows otherwise.

[71] It is clear from the bulk of the contemporaneous documentary evidence that the primary parties to the contract for works performed by the plaintiff were Warga Hikmat and the plaintiff. The documentary evidence does not disclose the subsistence of any joint or several liability on the part

of MMCOG. Neither does the contractual documentation bear out the construction that Warga Hikmat was acting for or on behalf of MMCOG. The documentary evidence instead discloses that MMCOG had no nexus whatsoever with the works undertaken and performed by the plaintiff at the behest of Warga Hikmat. Put another way, there was no privity of contract between the plaintiff and the consortium. As such neither the consortium nor MMCOG, can be liable for work done under a contract between Warga Hikmat and the plaintiff. In this context, the oral evidence of the consortium director or project director cannot override the contemporaneous documentary evidence. The learned judge erred in preferring such oral evidence and ignoring the documentary, contemporaneous evidence.

Events Subsequent To The Performance Of The Works

[72] It is evident from a perusal of the learned trial judge's judgment that liability was imposed on MMCOG by reference to documents issued after the contracts and purchase orders had been executed by the plaintiff and Warga Hikmat. Her Ladyship was, with respect, convinced that liability extended to MMCOG as a member of the consortium by reason of:

(a) The oral evidence of PW3 and PW4 who had testified, in their respective positions as project director and project manager appointed by the management committee of the consortium, that the plaintiff had completed its works as required under the project. The fact that they were appointed by the consortium rather than the second defendant was given considerable weight;

(b) The fact that the statement of final accounts carries the consortium's logo; and

(c) The citation of the preamble to the terms and conditions set out by Warga Hikmat in its appointment of the plaintiff as sub-contractor.

[73] Premised on these matters the learned judge concluded that there was in fact "a link" between the consortium and the sub-contract entered into by the plaintiff. With great respect these conclusions in (a) to (c) above are less than tenable for the following reasons:

(a) As stated earlier, the fact that persons appointed by the consortium evaluated or verified the work undertaken by the plaintiff cannot alter or vary the contract entered into between Warga Hikmat and the plaintiff as evidenced, *inter alia*, by the purchase orders, invoices, final statements and payments made. This is because the work done by the plaintiff at the behest of Warga Hikmat, was ultimately for the consortium. But the terms of the consortium agreement between Warga Hikmat and MMCOG *inter se*, clearly delineate the scope of works between the parties such that each party has sole responsibility for its own scope of works.

At the risk of repetition the material terms of the consortium agreement bear this out. As such, when the plaintiff as subcontractor completes its work, it requires verification for the purposes of meeting the standards imposed under the consortium agreement. It does not however follow that by reason of such verification, liability for work done by the plaintiff under the terms of a specific sub-contract with Warga Hikmat, thereby passes on or accrues to MMCOG;

(b) The fact that the statement of final account carries the logo of the consortium is insufficient to warrant the inference that MMCOG or the consortium is therefore liable for work done by the plaintiff under its sub-contract with Warga Hikmat. More significantly, the content of the final account clearly stipulates on the face of it that Warga Hikmat is the main contractor and that the plaintiff is the subcontractor. The learned judge failed to allude to this crucial evidence in her analysis of the evidence;

(c) The citation of the preamble referred to by the judge selectively reflects the first statement namely that there subsists a consortium agreement between MMCOG and Warga Hikmat. However, the second and third sentences of the preamble clearly indicate that it is Warga Hikmat that requires the performance of sub-contract works by the plaintiff as subcontractor and that the plaintiff is willing and able to execute such works. Therefore, the entirety of the preamble clearly provides that the contract is between Warga Hikmat as main contractor and the plaintiff as subcontractor (in relation to works to be undertaken by Warga Hikmat under the terms of the consortium agreement).

[74] Given the foregoing, it is clear that the learned judge erred in concluding in the face of such contemporaneous documentary evidence that the consortium or MMCOG was or could be liable for the debt due and owing from Warga Hikmat to the plaintiff. It appears that the learned trial judge had erroneously:

(a) Failed to consider relevant contemporaneous documents;

(b) Misconstrued the content of various documents;

(c) Relied on events and matters subsequent to the primary documentation;

(d) Given undue weight to the oral evidence of the plaintiff's witnesses and wrongly preferred the same over the contemporaneous documentary evidence; and

(e) To conclude that MMCOG was liable for the debt due and owing from Warga Hikmat to the plaintiff.

[75] In this context the rules for the construction of contracts as laid down variously in *Dato' Shazryl Eskay Abdullah v. Merong Mahawangsa Sdn Bhd & Anor* [2014] 5 CLJ 265; [2014] 3 MLJ 892 and *Tindok Besar Estate v. Tinjar*

A *Co* [1979] 1 LNS 119 are relevant. In *Faber Merlin (M) Sdn Bhd & Ors v. Lye Thai Sang & Anor; Tan Kim Chua Realty (M) Sdn Bhd v. Lye Thai Sang & Anor* [1985] 1 LNS 44, Wan Sulaiman SCJ held as follows:

> The respondents had tried to introduce evidence of subsequent conduct, a move which found favour with the trial judge and such evidence clearly
B had the effect of fortifying his earlier view. It relates to that part of the agreed facts wherein it was admitted that whilst the 1st appellant applied for strata title on May 25, 1980, no application was made for strata title for the three areas contended to be common property including the basement car parks until somewhat later.
>
C Respondents had also sought to introduce evidence to the effect that the managing director of the 1st appellant had, at the time the respondents had purchased the property, said that the basement car parks were not for sale and that the income derived therefrom would be used to subsidise the service charges.
>
D Raja Abdul Aziz relies on the rule reiterated in *Wickman Tools v Schuler AG* [1974] AC 235 which reads:
>
> > The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used.
>
E Section 92 of the Evidence Act is substantially to the same effect. Learned counsel for the respondents contends that section 92(f) of the Act "any fact may be proved which shows in what manner the language of the document is related to existing facts" permits him to refer to that part of the agreed facts (...) wherein the 1st appellant had made a separate
F application for strata title to the basement car parks, hotel lobby mezzanine floor and roof garden as an aid to construing the agreement.
>
> We are not persuaded that there is any ambiguity in that part of the agreement which would justify ignoring the general rule against the admission of extrinsic evidence.

G **[76]** In like manner there appears to be no reason to take into account the oral extrinsic evidence of the project witnesses, PW3 and PW4 to determine the issue of liability for works carried out by the plaintiff, in the face of clear documentary evidence on the subject. There appears to be no justification for the inclusion of such oral evidence, particularly to override the express
H written provisions of the contract between Warga Hikmat and the plaintiff.

[77] The only other way in which liability could accrue or devolve to MMCOG is if MMCOG as a partner to the consortium agreement agreed expressly by way of a novation agreement to undertake such liability on behalf of Warga Hikmat. That is not the case here.

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The Proposal And Discussions Between MRCSB And The Plaintiff

[78] It is clear from a consideration of the background facts in this context that MMCOG had no part to play in the assurances given by MRCSB to the plaintiff and other subcontractors, in order to complete the works, despite their not having been paid for work done.

[79] The learned trial judge at paras. 66 to 77 of the grounds of judgment appears to justify the imposition of liability on MMCOG premised on letters issued by the plaintiff to the consortium from 21 October 2009 to 17 April 2012. However a closer reading of the relevant letters discloses that:

(i) *vide* letter dated 21 October 2009 by John Chok to the plaintiff, the contents clearly make reference to a meeting between Warga Hikmat and the plaintiff. MMCOG is not mentioned;

(ii) in a letter issued by the plaintiff to the consortium dated 24 October 2009, the plaintiff replies to the letter of 21 October 2009 asking for a written commitment that payment due would be remitted to it directly subject to final adjustments to be mutually agreed between Warga Hikmat, MRCSB and itself. Again MMCOG does not come into the picture;

(iii) on 24 November 2009, the plaintiff wrote to MRCSB (the owners) pleading that despite having submitted their letters indicating that they were committed to complete the works despite non-payment by Warga Hikmat, they had not received any update from Warga Hikmat on this matter. They sought a letter of undertaking from MRCSB to set aside monies remaining due to Warga Hikmat to be remitted directly to the subcontractors who were owed monies. Again, there is no mention of MMCOG or the consortium in the settlement of these outstanding balances clearly stated to be due solely from Warga Hikmat; and

(iv) *vide* letter dated 8 July 2010 by the plaintiff to MRCSB, the plaintiff again recited that it was at all times the subcontractor for the project under Warga Hikmat. The plaintiff further stated that when Warga Hikmat went into liquidity problems in 2009, they continued to support the project at the request of Warga Hikmat. The consortium was not mentioned at all.

[80] Therefore it is clear even from the respondent's own letters that the liability for payment of monies due was solely from Warga Hikmat and not the consortium or MMCOG. The learned trial judge failed to consider these letters adequately or at all.

Payment Of Monies Due Under The Consortium Agreement By MRCSB Into An Escrow Account

[81] The learned judge in her judgment made a finding that monies due to the plaintiff were paid out by the consortium. However the evidence at trial as referred to above discloses that the plaintiff received payments directly

from Warga Hikmat. No payments were issued by MMCOG or directly from the consortium's account to the plaintiff.

[82] The reference made by the judge to cl. 9.2 of the consortium agreement refers to payments *inter se* between the partners to the agreement rather than by the partners to third party subcontractors. It would therefore appear that the learned judge erred in concluding that the consortium was liable for, or that monies had been paid out to the plaintiff as subcontractor from the consortium's account.

Adverse Inference Drawn Against MMCOG With Regards To Monies In The Consortium Account

[83] A perusal of paras. 95 to 101 of the grounds of judgment disclose that the learned trial judge had concluded on the basis of several letters issued by MMCOG to Warga Hikmat that MMCOG had full access to, and had taken control of the consortium account upon Warga Hikmat being wound up. In this context, *vide* letter dated 3 June 2011, MMCOG advised the liquidators of Warga Hikmat that it intended to enforce its rights under the consortium agreement in light of the occurrence of an event of default. This included the cessation of the project manager from carrying out duties under the consortium agreement and for MMCOG's representative to take over.

[84] Subsequently on 31 January 2012, MMCOG gave notice again to the liquidators of Warga Hikmat of its intention to exercise its rights in light of the Warga Hikmat's event of default. In essence, MMCOG advised that it would assume the sole authority to operate the consortium's escrow account.

[85] Apart from these letters which reflect MMCOG's stated intention to take over conduct of this escrow account, there was no further evidence before the court of MMCOG actually doing so. Neither the liquidators of Warga Hikmat testified, nor was there any evidence from the bank to this effect. In point of fact DW1, who was the sole witness for MMCOG testified that notwithstanding the stated intent of the letters, MMCOG had not in fact taken control of the escrow account.

[86] The learned judge rejected DW1's testimony, and went on to draw the inference that MMCOG did in fact have access to, and control of that escrow account, and was therefore liable to pay the plaintiff for work done from this escrow account. Again there appears to be no factual basis for the learned judge to have so concluded, as there is no evidence to the effect that MMCOG did in fact take control of the escrow account.

[87] The letters in themselves coupled with DW1's denial of such control would suggest to the contrary. DW1 in her evidence expressly testified that the bank did not give MMCOG control of the account as Warga Hikmat had been wound up. There is no evidence whatsoever to rebut DW1's evidence. As such, it would appear that the learned judge came to the conclusion that MMCOG had full access to, and control of the consortium's escrow account,

without any reasonable or cogent evidence to support any such finding. The imposition of liability on the MMCOG on this basis was a conclusion which could not reasonably be arrived at on the evidence before the court. It would appear to be plainly wrong.

Conclusion

[88] The totality of the evidence, particularly the contemporaneous documentary evidence before the court, clearly established that there was no privity of contract between the plaintiff and MMCOG. It is trite that only the parties to a contract are entitled to sue on the terms of the contract and to be liable for the obligations contained therein. (see *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67 (Privy Council) and *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393).

[89] As such, the learned trial judge's conclusion that MMCOG was liable to pay the plaintiff for debts owed to it by Warga Hikmat is flawed. On the contrary, the evidence on record discloses that there is no contractual nexus between MMCOG and the plaintiff, and accordingly, there is no liability on the part of MMCOG to make payments to the plaintiff in respect of a debt due from a separate entity, namely Warga Hikmat. The appeal by MMCOG is therefore allowed with costs of RM35,000 to MMCOG to cover the costs here and below. The deposit is refunded.

[90] We also make a consequential order that the sum of RM7,405,345.77 (plus interest) in the stakeholders account is to be released to MMCOG immediately.

Endnote:

1. The fourth defendant was struck out as a party in the court below. The second defendant, Warga Hikmat was wound up prior to trial. The named third defendant is not an entity known in law, not capable of suing or being sued. As such, the trial proceeded only between the plaintiff and the MMCOG.